Admissibility & Reliability of Evidence

July 1

2018

This outline is a companion to the New Immigration Judge Training provided by the Executive Office for Immigration Review.

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I. Receipt & Submission of Evidence

The Immigration Court Practice Manual provides a general guide for the submission and receipt of evidence. *See generally* Immigration Court Practice Manual (Nov. 2, 2017), *available at* https://www.justice.gov/sites/default/files/pages/attachments/2017/11/02/practicemanual.pdf.

According to the current Manual, evidence must be submitted fifteen days before a nondetained merits or master calendar hearing; filing dates for detained cases are set by the Immigration Judge ("IJ"). *Id.* Chap. 3.1(b)(i)–(ii). All documents submitted with the Court must follow a specified format. *Id.* Chap. 3.1(c). The Manual also contains requirements for specific types of evidence. *Id.* Chap. 3.1(d), (e).

Untimely or illegible filings can be excluded or given less weight. *Id.* Chap. 3.1(c), (c)(v), (d)(ii). The same is true of filings that lack a required fee. *Id.* Chap. 3.4(d), (h). If a witness list is untimely, the witnesses on the list are barred from testifying. *Id.* Chap. 3.1(d)(ii).

II. Admissibility of Evidence

Under the regulations governing removal proceedings, an IJ "may receive in evidence any oral or written statement that is material and relevant to any issue in the case previously made by the respondent or any other person during any investigation, examination, hearing, or trial." 8 C.F.R. § 1240.7(a); *see also* 8 C.F.R. § 1240.1(c) ("The immigration judge shall receive and consider material and relevant evidence, rule upon objections, and otherwise regulate the course of the hearing.").

There are no strict rules of evidence in immigration proceedings; instead, "the test for admitting evidence is whether it is probative and its admission is fundamentally fair." *Matter of Y-S-L-C-*, 26 I&N Dec. 688, 690 (BIA 2015); *see also Vladimirov v. U.S. Att'y Gen.*, 805 F.3d 955, 963–64 (10th Cir. 2015) (collecting cases). Although instructive, the Federal Rules of Evidence do not apply in immigration proceedings. *Zerrei v. U.S. Att'y Gen.*, 471 F.3d 342, 346 (2d Cir. 2006); *Dallo v. INS*, 765 F.2d 581, 586 (6th Cir. 1985); *Y-S-L-C-*, 26 I&N Dec. at 690; *Matter of D-R-*, 25 I&N Dec. 445, 458 (BIA 2011). However, "the fact that specific evidence would be admissible under the Federal Rules 'lends strong support to the conclusion that admission of the evidence comports with due process.'" *D-R-*, 25 I&N Dec. at 458 n.9 (quoting *Felzcerek v. INS*, 75 F.3d 112, 116 (2d Cir. 1996)).

III. Weight & Reliability of Evidence

Because the rules of evidence are relaxed in immigration proceedings, the pertinent question regarding most evidence in this context is not whether evidence submitted by either party is admissible, but what weight the IJ should accord it in adjudicating the issues before the Court.

A. Evidence & Testimony Presented in Bond Proceedings

Under the applicable regulations, "[c]onsideration by the Immigration Judge of an application or request of a respondent regarding custody or bond . . . shall be separate and apart from, and shall form no part of, any deportation or removal hearing or proceeding." 8 C.F.R. § 1003.19(d).

However, an IJ's determination of custody status or bond can be based on "any information that is available to the Immigration Judge or that is presented to him or her by the alien or the [Department of Homeland Security]." 8 C.F.R. §1003.19(d).

B. Hearsay

Hearsay is generally admissible in immigration proceedings, provided it is reliable and probative, and its admission is fundamentally fair. *See Vladimirov*, 805 F.3d at 964; *Banat v. U.S. Att'y Gen.*, 557 F.3d 886, 892 (8th Cir. 2009); *Anim v. U.S. Att'y Gen.*, 535 F.3d 243, 257 (4th Cir. 2008); *Dia v. U.S. Att'y Gen.*, 353 F.3d 228, 254 (3d Cir. 2003). Examples of unreliable hearsay evidence might include "[m]ultiple hearsay, where the declarant is steps removed from the original speaker," and reports "'prepared with the assistance of someone from the government from which [the applicant] is fleeing.'" *Amin*, 535 F.3d at 257 (quoting *Alexandrov v. U.S. Att'y Gen.*, 442 F.3d 395, 405 n.7 (6th Cir. 2006)).

However, relying on language contained in the Immigration and Nationality Act of 1965, Pub. L. No. 89-236, 79 Stat. 911 (Oct. 3, 1965) ("INA"), some circuits have recognized that immigration proceedings afford aliens something akin to a right to confrontation rooted in the Due Process Clause. *See* INA § 240(b)(4)(B) (stating that "the alien shall have a reasonable opportunity to examine the evidence against the alien, to present evidence on the alien's own behalf, and to cross-examine witnesses presented by the Government"). These circuits generally hold that the government "may not use an affidavit from an absent witness unless [it] first establishes that, despite reasonable efforts, it was unable to secure the presence of the witness at the hearing." *Cinapian v. U.S. Att'y Gen.*, 567 F.3d 1067, 1074 (9th Cir. 2009); *see also Karroumeh v. U.S. Att'y Gen.*, 820 F.3d 890, 898 (7th Cir. 2016); *Ocasio v. U.S. Att'y Gen*, 375 F.3d 105, 107 (1st Cir. 2004); *Olabanji v. INS*, 973 F.2d 1232, 1234 (5th Cir. 1992); *Dallo v. INS*, 765 F.2d 581, 586 (6th Cir. 1985). *But see Indrawati v. U.S. Att'y Gen.*, 779 F.3d 1284, 1300 n.23 (11th Cir. 2015).

C. The Exclusionary Rule

Although the exclusionary rule applies in immigration proceedings, it suppresses only *egregious* violations of the applicable federal regulations, Fourth Amendment to the United States Constitution, or other liberties. *See INS v. Lopez-Mendoza*, 468 U.S. 1032, 1051–51 (1984); *Yanez-Marquez v. U.S. Att'y Gen.*, 789 F.3d 434, 449–50 (4th Cir. 2015); *Chavez-Castillo v. U.S. Att'y Gen.*, 771 F.3d 1081, 1084 (8th Cir. 2014); *Oliva-Ramos v. U.S. Att'y Gen.*, 694

F.3d 259, 270–71 (3d Cir. 2012); *Almeida–Amaral v. U.S. Att'y Gen.*, 461 F.3d 231, 236–237 (2d Cir. 2006); *Orhorhaghe v. INS*, 38 F.3d 488, 492–93 (9th Cir. 1994); Matter *of Garcia-Flores*, 17 I&N Dec. 325, 328 (BIA 1980).

D. The Privilege Against Self-Incrimination

It is axiomatic that the privilege against self-incrimination found in the Fifth Amendment to the United States Constitution can be invoked "in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory." *Kastigar v. United States*, 406 U.S. 441, 444 (1972). However, in immigration proceedings, an IJ may properly draw an adverse inference from an applicant's refusal to testify on self-incrimination grounds. *See Mitchell v. United States*, 526 U.S. 314, 328 (1999).

E. Expert Witnesses

An IJ may rely on experts "regarding matters on which [the IJ] possess[es] little or no knowledge or substantive expertise." *Matter of Marcal Neto*, 25 I&N Dec. 169, 176 (BIA 2010). The Board of Immigration Appeals ("Board" or "BIA") relies on the Federal Rules of Evidence to determine the qualifications for and parameters of an expert witness's testimony. *See D-R-*, 25 I&N Dec. at 459–60. Moreover,

> an Immigration Judge who finds an expert witness qualified to testify may give different weight to the testimony, depending on the extent of the expert's qualifications or based on other issues regarding the relevance, reliability, and overall probative value of the testimony as to the specific facts in issue in the case.

Id. at 460 n.13; *see also Tun v. U.S. Att'y Gen.*, 485 F.3d 1014, 1027 (8th Cir. 2007); *Akinfolarin v. U.S. Att'y Gen.*, 423 F.3d 39, 43 (1st Cir. 2005).

F. Administrative Notice

An IJ is authorized to take administrative notice of "commonly known facts[,] such as current events or the contents of official documents." 8 C.F.R. § 1003.1(d)(3)(iv); *see Matter of Gomez-Gomez*, 23 I&N Dec. 522, 525 (BIA 2002). Unlike judicial notice, administrative notice also allows an immigration judge to "take notice of technical or scientific facts that are within the agency's area of expertise." *McLeod v. INS*, 802 F.2d 89, 93 n.4 (3d Cir. 1986) (citing *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344 (1953)).

In light of the above, courts regularly take administrative notice of legislation, judicial decisions, administrative actions, country conditions, and changes in government. *See Lorisme v. INS*, 129 F.3d 1441, 1445 (11th Cir. 1997); *K-Cruz v. INS*, 948 F.2d 962, 966–67 (5th Cir. 1991); *Kapcia v. INS*, 944 F.2d 702, 705 (10th Cir. 1991); *Kubon v. INS*, 913 F.2d 386, 388 (7th Cir. 1990); *Matter of G-D-*, 22 I&N Dec. 1132, 1144 (BIA 1999); *Matter of Chen*, 20 I&N Dec. 16, 18 (BIA 1989); *Matter of Morales*, 15 I&N Dec. 411, 412 (BIA 1975).

However, some circuits require that notice of intent to take administrative notice and an opportunity to respond be provided to the parties before administratively noticed facts can form the basis of an IJ's decision. *See Burger v. U.S. Att'y Gen.*, 498 F.3d 131, 134–35 (2d Cir. 2007) (addressing the circuit split); *Getachew v. INS*, 25 F.3d 841, 845–46 (9th Cir. 1994) ("The Board need not notify applicants before considering events that occurred before the deportation hearing and that were presented and argued before the IJ during the deportation hearing. By contrast, the Board must at least warn the asylum applicant before taking notice of significant events that occurred after the deportation hearing. A warning is all that is required where the facts in question are 'legislative, indisputable, and general,' such as, for example, which party has won an election in the immigrant's home country. Other, more controversial or individualized facts, such as whether a particular group remains in power after an election, and whether the election has vitiated any previously well-founded fear of persecution, require more than mere notice. Such controversial or individualized facts require both notice to the applicant that administrative notice will be taken and an opportunity to rebut the extra-record facts or to show cause why administrative notice should not be taken of those facts." (citations omitted)); *de la Llana-Castellon v. INS*, 16 F.3d 1093, 1099 (10th Cir. 1994) ("Because the administratively noticed facts constituted the sole evidence upon which the BIA relied to establish changed circumstances, advance notice and an opportunity to be heard on the significance of the political changes in Nicaragua was all the more crucial.").

G. Authentication of Conviction Documents

Conviction documents are subject to more stringent requirements than the general inadmissibility rule. The INA provides a list of specific documents that are admissible as proof of a criminal conviction, including "a certified copy" of certain official documents. *See* INA § 240(c)(3)(B). This reference to "certified" copies is described in 8 C.F.R. § 1003.41(b), which provides for the admissibility of copies that are authenticated through 8 C.F.R. § 287.6(c) (requiring submission of "a copy attested by the official having legal custody of the [original] record or by an authorized deputy") or through the submission of a written attestation by an immigration officer that the document is "a true and correct copy of the original." Records submitted to the government through electronic means are admissible if the document is certified in writing by the official with custody of the original and a qualified official from the Department of Homeland Security. *See* INA § 240(c)(3)(C); 8 C.F.R. § 1003.41(c).

Although described in the INA and the applicable regulations, the BIA has recognized that these methods are not the only means by which a document may be authenticated—and therefore admitted—in immigration proceedings. *See Matter of Velasquez*, 25 I&N Dec. 680, 684 (BIA 2012). Instead, these provisions "were intended to operate as 'safe harbors,' setting forth the conditions under which conviction documents . . . *must* be admitted;

Immigration Judges may admit documents that are authenticated in other ways if they are found to be reliable." *Id.* In particular, "'any [authentication] procedure that comports with common law rules of evidence constitutes an acceptable level of proof,'" so long as the alien's due process rights are protected. *Id.* (quoting *Iran v. INS*, 656 F.2d 469, 472 n.2 (9th Cir. 1981)).

H. Authentication of Official Records

Although the applicable regulations list specific methods for authenticating official records, courts recognize that such records may be authenticated through the requirements of 8 C.F.R. § 1287.6 or "through any recognized procedure, including the Federal Rules of Evidence." *D-R-*, 25 I&N Dec. at 458–59; *see also Fei Yan Zhu v. U.S. Att'y Gen.*, 744 F.3d 268, 272–74 (3d Cir. 2014); *Qui Yun Chen v. U.S. Att'y Gen.*, 715 F.3d 207, 211–12 (7th Cir. 2013); *Tassi v. U.S. Att'y Gen.*, 660 F.3d 710, 722–24 (4th Cir. 2011). However, "[t]he method of authentication that the party submitting the evidence utilizes may affect the weight of the evidence, and Immigration Judges 'retain broad discretion to accept a document as authentic or not based on the particular factual showing presented.'" *D-R-*, 25 I&N Dec. at 458–59 (quoting *Vatyan v. U.S. Att'y Gen.*, 508 F.3d 1179, 1185 (9th Cir. 2007)).

I. U.S. Department of State Country Reports & Religious Freedom Reports

Generally, IJs are entitled to rely on Country Reports and Religious Freedom Reports published by the U.S. Department of State. *See Matter of R-S-H-*, 23 I&N Dec. 629, 643 (BIA 2003) ("We see no error [in the Immigration Judge's reliance on country reports provided by the Department of State] and emphasize that the Immigration Judges and the Board frequently rely on such information."); *Matter of V-T-S-*, 21 I&N Dec. 792, 799 (BIA 1997) ("[W]e note that country conditions profiles developed by the State Department have been found to be 'the most appropriate and perhaps the best resource' for information on conditions in foreign nations." (quoting *Kazlauskas v. INS*, 46 F.3d 902, 906 (9th Cir. 1995))).

However, the circuit courts have also recognized that an IJ's reliance on reports published by the U.S. Department of State is not absolute. *See Berishaj v. U.S. Att'y Gen.*, 378 F.3d 314, 320 (3d Cir. 2004) ("While on the one hand the BIA may not 'hide behind the State Department's letterhead' and place full and uncritical reliance on a country report, neither is it permissible for the IJ and BIA not to address the relevant country report in some detail." (quoting *Ezeagwuna v. U.S. Att'y Gen.*, 325 F.3d 396, 407 (3d Cir. 2003))); *Gonahasa v. U.S. INS*, 181 F.3d 538, 542 (4th Cir. 1999) (stating that "[a] State Department report on country conditions is highly probative evidence," but "[i]t is true that State Department reports may be flawed and that private groups or news organizations often voice conflicting views," which "have drawbacks of their own"); *Gailius v. INS*, 147 F.3d 34, 46 (1st Cir. 1998) (stating that "[e]ven as to general country conditions, '[t]he advice of the State Department is not

binding, either on the [Department of Homeland Security] or on the courts.'" (quoting *Gramatikov v. INS*, 128 F.3d 619, 620 (7th Cir. 1997))); *Gramatikov*, 128 F.3d at 620 (noting that an alien "is free to rebut" reports from the Department of State because "there is perennial concern that the Department softpedals human rights violations by countries that the United States wants to have good relations with," but that the alien "had better be able to point to a highly credible independent source of expert knowledge" if he wants to do so).

J. Form I-213, Record of Deportable/Inadmissible Alien

It is well-established that a "Form I-213 is a presumptively reliable administrative document." *Gutierrez-Berdin v. U.S. Att'y Gen.*, 618 F.3d 647, 653 (7th Cir. 2010); *see also Vladimirov*, 805 F.3d at 964; *Maldonado v. U.S. Att'y Gen.*, 763 F.3d 155, 158 n.1 (2d Cir. 2014); *Espinoza v. INS*, 45 F.3d 308, 310–11 (9th Cir, 1995). As a result, it can be admitted without giving an alien the opportunity to cross-examine its author unless the alien presents evidence to contradict or impeach the statements made in the Form I-213. *See Barradas v. U.S. Att'y Gen.*, 582 F.3d 754, 763 (7th Cir. 2009); *Felzcerek*, 75 F.3d at 117; *Gomez-Gomez*, 23 I&N Dec. at 524 ("[A]bsent any evidence that a Form I-213 contains information that is inaccurate or obtained by coercion or duress, that document, although hearsay, is inherently trustworthy and admissible as evidence to prove alienage or deportability.").

The same logic has been applied to Form I-94W, Nonimmigrant Visa Waiver Arrival/Departure Record Form. *See Vasconcelos v. U.S. Att'y Gen.*, 841 F.3d 114, 119 (2d Cir. 2016).

K. Border, Airport & Credible Fear Interviews

Generally, "information on an authenticated immigration form is presumed to be reliable in the absence of evidence to the contrary presented by the alien." *Espinoza*, 45 F.3d at 310. However, as with all evidence, the record of information obtained during a border, airport, or credible fear interview must be accurate and reliable in order to be accorded appropriate weight in immigration proceedings. *Matter of J-C-H-F-*, 27 I&N Dec. 211, 212–13 (BIA 2018); *Matter of S-S-*, 21 I&N Dec. 121, 123–24 (BIA 1995).

A reliable record requires, at a minimum, "a meaningful, clear, and reliable summary of the statements made by the applicant at the interview," but could also involve "a hand-written account of the specific questions asked of the applicant and his specific responses to those questions," and the signing of those statements by the applicant as an accurate summary of the interview. *S-S-*, 21 I&N Dec. at 123–24; *see also J-C-H-F-*, 27 I&N Dec. at 212–213 (collecting cases). In assessing the weight to assign statements made at a border, airport, or credible fear interview, the IJ should consider the totality of the circumstances presented, including, among other factors:

> (1) whether the record of the interview is verbatim or merely summarizes or paraphrases the alien's statements; (2) whether the questions asked are designed to elicit the details of a claim and the interviewer asks follow-up questions that would aid the alien in developing his or her account; (3) whether the alien appears to have been reluctant to reveal information to the interviewer because of prior interrogation sessions or other coercive experiences in his or her home country; and (4) whether the alien's answers to the questions posed suggest that he or she did not understand English or the interpreter's translations.

J-C-H-F-, 27 I&N Dec. at 214–15.